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No. 94-1532

In The

Supreme Court of the United States

October Term, 1994

PARKING ASSOCIATION OF GEORGIA, INC., CAPITOL OUTDOOR ADVERTISING, INC., OUTDOOR SYSTEMS, INC., MORRIS N. HABIF, and SEABORN WRIGHT, JR.,

Petitioners,

v.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL PARKING ASSOCIATION IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

National Parking Association, Inc. (hereinafter "NPA"), through its counsel and pursuant to Sup. Ct. R. 37, and with the written consent of the parties to this matter which is being filed simultaneously herewith, hereby submits this brief in support of petitioners' Petition for Writ of Certiorari in the above-captioned case (hereinafter the "Petition").

INTEREST OF THE NATIONAL PARKING ASSOCIATION

A. Statement of Facts

The facts of this case are described fully in the Petition. Petition at pp. 3-5. Accordingly, for the sake of brevity, NPA will discuss only those facts which are most relevant to the issues addressed in its argument in support of the Petition.

On May 18, 1992, the respondent enacted an ordinance (hereinafter the "Ordinance") applying retroactively to commercial and noncommercial surface parking lots located in seven downtown and midtown zoning districts in Atlanta, Georgia (hereinafter the "Affected Zoning Districts"). The Ordinance requires the owners of the affected lots to install barrier curbs around the perimeters of the lots and to create landscaped areas in the lots equal to at least ten percent of the paved area. The landscaped areas must include one tree per eight parking spaces and shrubs and ground cover between trees. It provides minimum size requirements for the trees and mandates continued maintenance of the landscaped areas at the owners' sole expense. In fact, all expenses of compliance, including the initial expense and long term maintenance, must be borne by the owners of the affected lots. *See* Petition Appendix at pp. 45a-48a.

The Ordinance applies to an estimated 350 parking lots. Compliance will cost private landowners about

$12,500 per lot, meaning that the cost of compliance for the affected lots will total approximately $4,375,000. Commercial parking lot owners will also lose income from parking fees due to a diminution in parking spaces caused by compliance. Further, many parking lot operators will lose the rental income from advertising signs located on the properties, because the sign companies will cancel their leases with the lot owners and remove billboards once they are obstructed by the trees required to be planted. The amount of the lost rental income will be substantial. Petition at pp. 4-5.

The Ordinance does not provide for payment of compensation by the City of Atlanta to those required to expend funds to comply, nor to those whose income is reduced as a result of lost parking spaces and advertising signs.

B. Relevant History of Proceedings

The petitioners have sought review of a judgment issued by the Supreme Court of Georgia on November 28, 1994. *Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994). In a divided opinion, the Georgia Supreme Court ruled, *inter alia*, that the Ordinance did not violate the Fifth or Fourteenth Amendments to the United States Constitution. With respect to the Fifth Amendment, the court applied a balancing test and reasoned that the petitioners failed to present clear and convincing evidence that the Ordinance was a significant detriment to them or that the Ordinance is unsubstantially related to the public health, safety, morality and welfare. The court also held that the means adopted by the Ordinance had a real and substantial relation to the goals to be obtained.

Concerning the Fourteenth Amendment claims, the court held that the Ordinance did not constitute an unconstitutional denial of equal protection because it

rationally differentiated between the larger and smaller parking lots and between affected and unaffected zoning districts.

C. NPA's Interest

NPA is a non-profit organization which has served the parking industry since 1951. It represents more than 1,000 members from every facet of the industry, including private commercial parking operators, planners, designers and owners of parking facilities, suppliers of products and services to the industry, governmental, institutional and non-profit parking administrators, and parking industry consultants. Its current members are located in 46 of the 50 states, the District of Columbia, Puerto Rico and Guam.

The vast majority of the facilities operated by NPA-member parking operators are surface parking lots. Nearly all of these lots have more than thirty spaces, and most of them are located in urban areas which have zoning ordinances.

The Ordinance raises issues of major concern to NPA and its members, not only those who operate surface parking lots in the City of Atlanta, but also those who operate facilities throughout the United States and its territories. The requirement that operators improve, landscape and maintain their lots at significant expense and loss of revenue, without compensation, in the manner required by the Ordinance, or in similar a manner by other municipalities, poses a direct threat to the economic viability of many NPA members, without advancing a legitimate government interest in a constitutional manner. Indeed, NPA is concerned that, if allowed to stand, the Atlanta Ordinance will encourage other municipalities throughout the United States to pass legislation which unfairly requires parking lot owners to bear the cost of aesthetically improving urban centers, a cost

which rightfully should be borne by the public. It should also be noted that some municipalities have ordinances requiring surface parking lots to have a certain number of spaces. If such municipalities also pass legislation similar to the Ordinance which requires the conversion of parking spaces to landscaped areas, parking lot owners could be placed in a position where it would be impossible to operate their lots in compliance with existing laws. It is for these primary reasons that NPA has submitted this brief in support of the Petition.

SUMMARY OF ARGUMENT

The Supreme Court of Georgia erroneously concluded that the Ordinance complies with the Fifth Amendment under the standard discussed in *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), because, *inter alia*, in that case the zoning ordinance was enacted prior to the development of the property, and here the Ordinance applies to existing valid uses of the property. In fact, the Ordinance constitutes an unconstitutional taking under the "rough proportionality" test used by the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), because the conditions imposed on the affected parking lot owners are grossly disproportionate compared to the impact of the parking lots.

The Ordinance is also unconstitutional because in requiring the dedication of a significant portion of the parking lots to landscaped areas for public enjoyment, it is tantamount to an unconstitutional "physical invasion" under the holdings in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

Furthermore, the Ordinance constitutes unconstitutional reverse spot zoning, as defined by the Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978) and violates petitioners' rights to substantive due process. The Ordinance arbitrarily imposes restrictions and severe financial burdens on the petitioners' parking lots.

Finally, the Ordinance unconstitutionally applies to existing parking lots which were legally zoned and permitted prior to its enactment. Because the Ordinance is designed primarily to enhance the aesthetics of the Affected Zoning Districts, no compelling reason exists to implement it immediately with respect to existing parking lots.

ARGUMENT

A. The Supreme Court of Georgia's Reliance on *Agins v. Tiburon* is Misplaced.

In holding that the Ordinance was valid under the Fifth Amendment, the Supreme Court of Georgia relied upon *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), stating that the Ordinance "advances legitimate governmental interests and leaves the plaintiffs with an economically viable use in their property." *Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 766 n. 3, 450 S.E.2d 200, 203 n. 3 (1994).

The appellants in *Agins* acquired five acres of unimproved land in Tiburon, California for residential development. Before they began to develop the property, the city passed two ordinances which modified existing zoning requirements by placing the property in a zone permitting the construction of between one and five single-family houses on the five-acre tract. Rather than seeking approval for development of their land under these zoning ordinances, the appellants filed suit contending that

the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments.

This Court held that the zoning ordinance did not effect a taking without just compensation. It concluded that application of a general zoning law to a particular property constitutes a taking "if the ordinance does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land." 447 U.S. at 260, 100 S. Ct. at 2141, 65 L.Ed.2d at 112 (citations omitted). Applying this analysis, the *Agins* Court concluded that the appellants "will share with other owners the benefits and burdens of the City's exercise of its police power" and that the "zoning ordinances benefit the appellants as well as the public by serving the City's interest in assuring careful and orderly development of residential property with provision for open space areas." 447 U.S. at 262, 100 S. Ct. at 2142, 65 L.Ed.2d at 113.

The Georgia Supreme Court's reliance on *Agins* is misplaced. In *Agins*, the city modified zoning regulations *before* the appellants had commenced development of their property. Indeed, this Court noted that there was "no concrete controversy regarding the application of the specific zoning provisions." 447 U.S. at 260, 100 S. Ct. at 2141, 65 L.Ed.2d at 111. In contrast, by enacting the Ordinance at issue in this case, the City of Atlanta did not change the zoning regulations applicable to the petitioners' property as they relate to future development. Instead, it required the petitioners, who were complying with existing zoning requirements, to take costly measures in order to continue to operate pre-existing businesses on their properties.

Moreover, the Ordinance requires the petitioners to forego substantial income on a permanent basis in order to comply. There was no allegation in *Agins* that the appellants were forced to give up guaranteed income that

would result from the use of their property. In essence, rather than being a statute requiring the preservation of open space, the Ordinance in this case retroactively requires the creation of open space through the extraction of the value of improved property at the petitioners' sole expense. Finally, the Ordinance does not benefit the petitioners as well as the public in the same manner as the zoning ordinances at issues in *Agins*. Whereas in *Agins* the appellants could prospectively alter their proposed development to comply with the open space requirements and perhaps reap some benefit from the development which was mandated, here the petitioners are being forced retroactively to convert currently valid income-producing property for public enjoyment purposes, without any measurable benefit to them.

B. The Decision of the Supreme Court of Georgia Upholding the Ordinance Is In Conflict With *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*.

The Ordinance under consideration is more closely compared to the ordinance reviewed by this Court in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994). In *Dolan* the owner of a plumbing and electric supply store applied to the City of Tigard, Oregon, for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store and paving a parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, the owner proposed to build an additional structure on the northeast side of the site for complementary businesses, and to provide more parking. The city planning commission granted the owner's permit application subject to the requirement that she dedicate sufficient open-land area for greenway adjoining and within the floodplain, including portions at a suitable

elevation for the construction of a pedestrian/bicycle pathway within the floodplain. The dedication required by that condition encompassed approximately 7,000 square feet, or roughly ten percent of the property. The plaintiff contended that the dedication requirement violated her rights under the Fifth and Fourteenth Amendments.

The *Dolan* Court considered the "essential nexus" test discussed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987). In that case, this Court considered whether the California Coastal Commission could constitutionally impose as a condition to approval of a rebuilding permit a requirement that the applicants provide lateral access to the public to pass their beachfront property. The Court held that no nexus existed between the government's interest in visual access to the ocean from the roadway and a permit condition requiring lateral public access along the applicants' beachfront lot. Thus, the Court concluded that the exaction of the easement without compensation violated the applicants' Fifth Amendment rights. 483 U.S. at 837, 107 S. Ct. at 3148, 97 L.Ed.2d at 689.

Significantly, in analyzing the owner's claims in *Dolan*, the Court also distinguished *Agins*, *supra*, and similar cases as follows:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioners' application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, *supra*, we held the governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

___ U.S. at ___, 114 S. Ct. at 2316-17, 129 L.Ed.2d at 316. (citations omitted).

For similar reasons, this case is distinguishable from the rezoning cases represented by *Agins* and its progeny. The Ordinance is not a legislative determination classifying an entire area of Atlanta. Instead, it affects only a narrow corridor of the city adjacent to the business district's main thoroughfare, and only a certain type of surface parking lot. More importantly, the Ordinance does much more than impose conditions limiting the petitioners' uses of their parking lots. Like the affirmative obligation to grant an easement placed on the owner in *Dolan*, the Ordinance challenged here requires the petitioners to take costly affirmative steps as a condition to the continued operation of their businesses. The result is that the Ordinance imposes an "unconstitutional condition" under *Dolan* – the exaction of money and loss of income from the petitioners in exchange for a public improvement not benefitting the petitioners in any measurable way.

In *Nollan* the Court held that under the Fifth Amendment, an essential "nexus" must exist between "the legitimate state interests" and the condition exacted by a city. 483 U.S. at 837, 107 S. Ct. at 3148, 97 L.Ed.2d at 689. It was not until the Court considered the issues presented in *Dolan*, however, that it determined the "degree of connection between the exactions and the projected impact of the proposed development." ___ U.S. at ___, 114 S. Ct. at

2317, 129 L.Ed.2d at 317. After discussing various tests being used by various state courts, this Court developed a "rough proportionality" test requiring that a "city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." ___ U.S. at ___, 114 S. Ct. at 2319-20, 129 L.Ed.2d at 320. The Court then considered the facts before it and concluded that "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." ___ U.S. at ___, 114 S. Ct. at 2321, 129 L.Ed.2d at 322. The Court reasoned that the city wanted to impose a permanent recreational easement on the owner's property, which would eviscerate her right to exclude the public. With respect to the bicycle pathway, the Court found that the city had failed to show how the additional number of vehicles and bicycle trips generated by the development reasonably related to the city's requirement for dedication of the pathway.

Applying *Nollan* and *Dolan* to this case, the Fifth Amendment has been violated because the Ordinance's exaction – the requirement that parking lot owners improve and landscape their properties at their own expense as a condition to remaining in business – is not "roughly proportional" to the "projected impact" of a "proposed development." There is no "proposed development," because the petitioners' parking lots are already developed and operating in a manner which is consistent with applicable zoning requirements. In this sense, there is no "projected impact" for the Court to weigh against the requirements of the Ordinance. It therefore follows that the direct and substantial financial burdens imposed on the petitioners are grossly disproportionate when compared to the aesthetic impact the parking lots have on the Affected Zoning Districts.

The dissenting justices in the decision below in this case properly recognized the application of *Nollan* and *Dolan* to the Ordinance, stating as follows:

> Extractions for the public benefit are generally upheld if the two requirements are met: First, that the extraction is closely related to a particular problem generated by the owner's use of his land, 1 Ziegler at § 6.10[1], [6][c]; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-840, 107 S. Ct. 3141, 3147-3150, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994); and second, that the extraction represents the property owner's proportion of the particular problem, 1 Ziegler at § 6.10[1], [6][c]; *Nollan*, 483 U.S. at n. 4, 835-36, 107 S. Ct. at n. 4, 3147-48; *Dolan*, 512 U.S. at ___, 114 S. Ct. at 2319, 129 L.Ed.2d at 320. A host of courts have applied these standards both before and after *Nollan*. *See* 1 Ziegler, § 6.10. A significant feature of the benefit extraction analysis is that an extraction may constitute a taking under it even though it would not under the "economically viable use" or "significant detriment" test. *See* 1 Ziegler, § 6-10[1]; *Dolan*, at ___, 114 S. Ct. at 2136, n. 6, 129 L.Ed.2d at 316, n. 6.

264 Ga. at 768, 450 S.E.2d at 204 (footnotes omitted). Thus, the dissent understood that a taking has occurred through the enforcement of the Ordinance even though no actual physical governmental invasion of the petitioners' property has occurred.

In passing the Ordinance, the respondent did not contend that the petitioners disproportionately contributed to an unsightly or unhealthy downtown business district by constructing and operating their parking lots. Indeed, the petitioners' businesses were built and are being operated pursuant to the respondent's own building and zoning codes. Nevertheless, the respondent has

attempted to require the petitioners to bear the entire expense of making the city more aesthetically pleasing by mandating the planting of trees and vegetation in spite of the Fifth Amendment's purpose "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835 n. 4., 107 S. Ct. at 3148 n. 4, 97 L.Ed.2d at 688 n. 4.

As discussed above, in *Dolan* the Court turned to representative state court decisions to determine if the city's findings were sufficient to justify the conditions imposed on the owner's building permit. For similar reasons, the Court should consider representative decisions from state courts and at least one federal court which have found ordinances and statutes requiring the expenditure of private funds or the dedication of the use of private property in similar settings to be unconstitutional. *See, e.g., Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992) (construing Cable Communications Policy Act as authorizing cable franchise operator to construct cable system on private property regardless of presence of any compatible easements would violate takings clause of Fifth Amendment); *Judlo, Inc. v. Vons Companies, Inc.*, 211 Cal. App. 3d 1020, 259 Cal. Rptr. 624 (4th Dist. 1989) (an injunction entered by a state court allowing a newspaper publisher to place its newsracks in front of a grocery store without the owner's consent is an unconstitutional taking of the grocer's private property under the Fifth and Fourteenth Amendments); *Howard County v. JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1984) (county ordinance requiring developers to reserve right-of-way in subdivision for proposed state road was unconstitutional taking of developer's property without compensation); *Rochester Telephone Corporation v. Village of Fairport*, 84 A.D.2d 455, 446 N.Y.S.2d 823 (4th Dept. 1982) (requiring a public utility to pay to place its transmission facilities underground for aesthetic

purposes was a taking which required compensation); *Redevelopment Authority of the City of Oil City v. Woodring*, 498 Pa. 180, 445 A.2d 724 (1982) (requiring a private property owner to expend her own funds to relocate electrical connections in order to facilitate and the placement of utility lines underground was a taking); and *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) (ordinance requiring, *inter alia*, private landowners to maintain a ten-foot open space perimeter near Williamsburg, Virginia, held violative of the takings clause of the Virginia Constitution).

C. The Ordinance is Tantamount to a "Physical Invasion" of Petitioners' Property and is Unconstitutional Under *Lucas v. South Carolina Coastal Council* and *Loretto v. Teleprompter Manhattan CATV Corp.*

Two United States Supreme Court decisions compel the conclusion that an uncompensated taking has occurred by the enactment and enforcement of the Ordinance. These are *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

In *Lucas*, the petitioner purchased two residential lots on the Isle of Palms, South Carolina, where he intended to build a single-family home on each lot. Two years later, South Carolina enacted the Beachfront Management Act, which prohibited the construction of occupiable improvements in certain beachfront areas. The Act had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. Lucas brought suit, alleging the Act deprived him of all economically viable use of the two parcels of property, thereby effecting a taking without just compensation.

In analyzing Lucas' takings claim, the Court identified two discrete categories of regulatory action which

are "compensable without case-specific inquiry into the public interest advanced in support of the restraint." ___ U.S. ___, 112 S. Ct. at 2893, 120 L.Ed.2d at 812-813. The first category includes challenges to any regulation that results in a "physical invasion" of the owner's property. ___ U.S. ___, 112 S. Ct. at 2893, 120 L.Ed.2d at 812. In this category, a regulation that compels a property owner to suffer a "physical invasion" or "occupation" of his or her property is compensable no matter how weighty the public purpose behind it or how minute the intrusion. *Id.* The second category includes any challenge where a landowner proves a regulation "denies all economically beneficial or productive use of land." *Id.* The Court labeled this category a "total taking." ___ U.S. ___, 112 S. Ct. at 2901, 120 L.Ed.2d at 822.

If a regulation results in either a "physical invasion" or a "total taking," the owner has suffered a taking *per se* and is entitled to just compensation under the Fifth Amendment regardless of the public interest advanced in support of the restraint, unless the State can meet a rebuttal test. Under the rebuttal test, the state can avoid paying compensation only by identifying "background principles of nuisance and property law that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found." ___ U.S. ___, 112 S. Ct. at 2901-2902, 120 L.Ed.2d at 823. In other words, the state must show the proscribed use interests were not part of the owner's title to begin with. ___ U.S. ___, 112 S. Ct. at 2899, 120 L.Ed.2d at 820.

The Supreme Court's holding in *Lucas* is applicable to this case because under the analysis in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1992), the respondent's enforcement of the Ordinance is the equivalent of a "physical invasion" of the petitioners' property. In *Loretto*, the Supreme Court reviewed a New York statute which required a landlord to permit a cable television company to install

its cable television facilities upon his property and prevented the landlord from demanding payment from the company in excess of the amount determined to be reasonable by a state commission. The landlord brought a class action for damages and injunctive relief, alleging that installation of cables by certain cable television companies insofar as those companies relied on the New York statute constituted a taking without just compensation.

This Court agreed, holding that when the character of the governmental action is a permanent physical occupation of real property there is a taking to the extent of the occupation without regard to whether the action achieves an important benefit or has only minimal economic impact on the owner. The Court reasoned that to the extent the government permanently occupies physical property, it effectively destroys an owner's right to possess, use, and dispose of his property, and concluded that the constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Expressly discarded was the argument of the City of New York that the invasion before it should be treated differently because it was not an actual invasion by the government. "A permanent physical occupation authorized by state law is a taking without regard to whether the state, or instead a party authorized by the state, is the occupant." 458 U.S. at 433 n. 9, 102 S. Ct. at 3174 n. 9, 73 L.Ed.2d at 880 n. 9.

The Ordinance under consideration here admittedly does not authorize a third party to plant trees and vegetation and install barrier curbs on the owners' parking lots. It does, however, require the owners themselves to take these actions solely for public uses in favor of income-producing uses of their property. Viewed in this manner, the Ordinance is similar to the statute found unconstitutional in *Loretto*. It requires the lot owners themselves to cause a permanent physical occupation of their own property by the planting of trees and vegetation and the

erection of barriers at their own expense. Thus, the Ordinance here is even more burdensome than the ordinance stricken in *Loretto* because while the landlord in *Loretto* was required to allow others to install cable in his building, he was not required to pay for the cable installation out of his own pocket.

The Ordinance is violative of the takings clause of the Fifth Amendment because it compels the owners of parking lots to suffer what is in essence a physical invasion of their property at the government's insistence and it provides for no compensation for the substantial outlay of funds for improvements and the loss of revenue suffered.

D. The Ordinance Constitutes Unconstitutional Reverse Spot Zoning And Violates Petitioners' Rights to Substantive Due Process.

The application of the Ordinance to the covered parking lots in the Affected Zoning Districts amounts to unconstitutional reverse spot zoning. This type of zoning has been defined by this Court as "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than neighboring ones." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 132, 98 S. Ct. 2646, 2663, 57 L.Ed.2d 631, 653 (1978), *citing* 2 A. Rathkopf, *The Law of Zoning and Planning*, 26-4 and n. 6 (4th ed. 1978). Although the Court has defined "reverse spot zoning," it has not applied the concept in a case similar to this one.

The enactment of the Ordinance constitutes reverse spot zoning as defined in *Penn Central* because it arbitrarily imposes restrictions and severe financial burdens on surface parking lots with 30 or more spaces within the Affected Zoning Districts, while excluding lots with fewer than 30 spaces within such districts, and all other lots outside of the districts, to the economic detriment of the owners of covered lots.

In addition to discriminatorily singling out parking lots of a certain size only in a certain location, the Ordinance violates the petitioners' substantive due process rights under the Fourteenth Amendment. For example, in *Guimont v. Clarke*, 121 Wash.2d 586, 854 P.2d 1 (1993), the state statute challenged, the Mobile Home Relocation Assistance Act, required the owners of mobile home parks to contribute money towards the relocation costs of their tenants when the owners' mobile home parks were closed. Noting that *Lucas, supra*, had reordered prior Fifth Amendment analysis, the court first considered whether fundamental attributes of ownership were impaired through "physical invasions" or "total takings," without engaging in any harm-versus-benefit analysis or examining the legitimacy of the governmental interest. 121 Wash. 2d at 600, 854 P.2d at 9.

The *Clarke* court concluded that the act under consideration did not rise to the level of a physical invasion requiring *per se* compensation under *Lucas* because it did not force park owners to allow others to occupy their land. This was so because unlike the case before this Court (i) the owners had voluntarily rented space to their tenants and (ii) the act itself did not compel the park owners to continue this relationship. However, the court struck the ordinance as violative of the Fourteenth Amendment's substantive due process provision, concluding that the ordinance was unreasonable because (i) it was unduly oppressive; (ii) the costs imposed on park owners were substantial; (iii) the act's passage was unanticipated at the time the owners' mobile home parks were opened; and (iv) it was permanent in nature. 121 Wash.2d at 611-12, 854 P.2d at 16-17.

Like the statute stricken in *Clarke*, the Ordinance here is unduly oppressive; it imposes substantial financial burdens on the petitioners; it was unanticipated by the petitioners when they entered the parking lot business; and it is permanent in nature. These effects of the Ordinance

render it violative of the petitioners' rights to substantive due process under the Fourteenth Amendment.

E. The Ordinance Unconstitutionally Applies to Previously Existing Facilities.

The Ordinance is applicable to previously existing parking lots in the Affected Zoning Districts. The owners of parking lots that were legally existing and validly permitted prior to the enactment of the Ordinance are required to dig up portions of their lots to install trees, shrubs and barriers curbs, all at their own expense. No existing affected lots were exempted from these requirements. The failure of the Ordinance to exempt existing parking lots violates the petitioners' rights to substantive due process and effects an unconstitutional taking without compensation. This rule has been explained as follows:

> Generally speaking, a use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by the ordinance, where it is a lawful use of property, is not a public nuisance, or harmful to the public health, safety, morals or welfare. . . . An attempt to eliminate nonconforming uses by enforcement of the penal provisions of zoning regulations is unlawful and invalid.
>
> If, when a zoning ordinance was adopted, premises were used for a nonconforming use, the owner or user has a right to continue that use. A zoning ordinance may not operate retroactively to deprive a property owner of previously vested rights; that is to say, a zoning ordinance cannot deprive the owner of the use to which the property was put before the enactment of the ordinance. A subsequent zoning ordinance cannot divest rights acquired by a property owner under a prior zoning ordinance.

8A E. McQuillin, *The Law of Municipal Corporations*, § 25.181 at p. 11 (3rd ed. rev. 1994) (footnotes omitted).

Furthermore, a regulation enacted merely to enhance the aesthetics of a community does not provide a compelling reason for immediate implementation with respect to existing structures or uses. This rule was explained in *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977) as follows:

> In contrast to a safety-motivated exercise of the police power, *a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses.* True, the public will benefit from a more aesthetically beautiful community, but absent the urgency present in a safety-motivated regulation, the immediate benefit gained does not outweigh the loss suffered by those individuals adversely affected. As always, an exercise of the police power must be reasonable.

373 N.E.2d at 261 (emphasis added) (citations omitted).

The expenditure of over $4,000,000 will be required in order to comply with the Ordinance, and a permanent loss of parking spaces available for lease will be incurred. The Constitution does not permit a city to enact a statute such as the Ordinance which causes such significant detriment to the owners of private property without excepting existing valid uses from the application of the Ordinance.

CONCLUSION

The Court should grant petitioners' Petition pursuant to Sup. Ct. R. 10.1(c) because the Supreme Court of Georgia has rendered an important decision which in part is in conflict with controlling decisions of this Court, and which otherwise presents important questions of federal law which have not, but should be, settled by this Court.

For these reasons, amicus curiae NPA respectfully requests that the petition for writ of certiorari be granted.

This is the 17th day of April, 1995.

Respectfully submitted,

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